"I may say at once that I accept substantially the petitioner's version of their life together in preference to that of the respondent's. Indeed, the respondent's evidence goes some way towards supporting and confirming some of the petitioner's allegations."

Counsel for the respondent has argued that the language of this passage, including the use of the word "preference", indicates that the learned trial judge has applied the standard of proof in civil cases, where findings of facts can be arrived at on the balance of probabilities.

In considering this argument, it is necessary to examine other parts of the judgment. For example, in setting out certain admissions made by the respondent, the learned trial judge said:—

"He admitted that he had probably contributed to the unhappy state of affairs between them; that he should have been more understanding of her character; that he should have made modifications in his own character; that he should have lived more in the present and not planned for the future; that perhaps he had been too careful about money."

It is important to note that the learned trial judge's comment on these admissions was couched in the following terms:—

"I consider these to be gross understatements of the real position."

In another part of the judgment, certain allegations made by the respondent are set out as follows:—

"The respondent maintained that he was not guilty of cruelty, but if he was guilty of any of the acts alleged against him, which he denied, then he claimed that the petitioner had unreasonably provoked him or alternatively that she was suffering under the unwarranted impression of a persecuted person being an adopted child. He further asserted that any differences which had arisen between himself and his wife after the marriage had been wilfully advised and instigated by the petitioner's relations especially her mother and friends. The respondent denied that he was responsible for the ill-health of the petitioner and contended that it was due solely to her own short-comings and her inability to readjust herself to a normal married life."

It is significant that the learned trial judge's comment on this aspect of the case was as follows:—

"There is no substance, in my view, in any of these allegations."

In our opinion, the most significant part of the judgment may be found in the passage following the paragraph in which a reference is made to the case of *Gollins* v. *Gollins*.[1] This passage reads as follows:—

"The present case, in my view, falls squarely within the principles enunciated in *Gollins'* case (*supra*) and the respondent has, in my judgment, been guilty of the matrimonial offence of cruelty."

Having regard to the language used by the learned trial judge and to the tenor of his judgment and also to the fact that he was a judge of great experience in criminal law, who had heard criminal cases in the High Court for eleven years, we find it impossible to say that he has overlooked the principle that the case against the respondent had to be proved beyond reasonable doubt.

After seeing and hearing the witnesses and considering all the evidence, the learned trial judge arrived at the conclusion, to adopt his own words, that the combination of all the various factors, the cumulative reprehensible conduct of the respondent was sufficiently weighty to enable him to say that the petitioner ought not to be called on to endure it.

Since this is an appellate court, it is incumbent upon counsel for the respondent, before he can succeed in this appeal, to show that the learned trial judge has erred in his assessment of the evidence or that he has misdirected himself or that for some other good reason the conclusion reached by him should be upset. This, in our view, counsel for the respondent has failed to do. We are accordingly of the opinion that the judgment of the learned trial judge should stand.

In the result the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *S.K. Lee & Co.; Rodyk & Davidson.*

CHINA INSURANCE CO. LTD. v. ANG BAY KANG

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. & Choor Singh J.) November 17, 1968]

[Singapore—Federal Court Civil Appeal No. Y.27 of 1968]

Insurance — Motor insurance — User of car — — Car sent for repair — Testing of, on road by repairer — Accident — Whether car was used for the purpose of policyholder or in connection with motor trade.

The sole question in this appeal was whether the testing of a car on the road by a motor car repairer after repairs had been carried out was a use for a purpose in connection with the motor trade as provided in the relevant clause of the policy which prescribed limitation as to use as follows: "Use only for social, domestic and pleasure purposes and for the policyholder's business. The policy does not cover use for hire or reward, racing, pace-making, reliability trial, speed-testing, the carriage of goods other than samples in connection with any trade or business or use for any purpose in connection with the motor trade."

Held: every motor car owner who sends his car to the garage for repairs wants to be sure that it is in good running order when he receives it back and for this purpose he gives either directly or by implication authority to the garage proprietor to test the car after repairs and when the car is being tested on the road, it is being used on behalf of the owner i.e. the policyholder and therefore for the purpose of the policyholder to make sure that it is in good running order. Such use cannot be said to be a use "for a purpose in connection with the motor trade".

Cases referred to:—

(1) *John T. Ellis Ltd.* v. *Hinds* [1947] 1 All E.R. 337.

(2) *Official Administrator* v. *China Insurance Co. Ltd.* [1957] M.L.J. 59, 61.

(3) *Browning* v. *Phoenix Assurance Co. Ltd.* [1960] 2 Lloyd's Rep. 360.

(4) *Gray* v. *Blackmore* [1934] 1 K.B. 95.

FEDERAL COURT.

S.K. Lee for the appellants.

Denis Murphy for the respondent.

Cur. Adv. Vult.

Choor Singh J. (delivering the judgment of the court): This is an appeal from a judgment of the High Court in which it was held that the plaintiff is entitled to recover from the defendant company, as the insurers of motor-car No. SU. 4191, the sum of $18,246 being the total amount of damages and costs and interest thereon awarded to the plaintiff in an action against one Quek Poh Khoon, in respect of injuries which the plaintiff suffered arising from Quek Poh Khoon's negligent driving of the said motor-car.

The facts are not in dispute and briefly are as follows. One Madam Tay who was the owner of motor-car No. SU. 4191 sent her said car to a garage known as the Kim Seng Motor Engineering Co. for repairs. The car was repaired by the said Quek Poh Khoon, an employee of Kim Seng Motor Engineering Co. and after carrying out repairs Quek took the car out on the road to test it. Not far from the garage he collided with the plaintiff who was injured. The plaintiff brought an action for negligence against Quek and was awarded damages in respect of personal injuries in the sum of $12,657 and costs which were taxed at $2,463. The plaintiff then commenced these proceedings to recover from the defendant company the fruits of the judgment obtained by him against Quek on the ground that the defendant company was liable under the terms of the policy of insurance entered into by them with Madam Tay the owner of motor-car No. SU. 4191. At the time of the accident there was in force in respect of motor-car No. SU. 4191 Policy No. NT/MC. 696379 issued to Madam Tay by the defendant company. The defendant company disclaimed liability on two grounds:—

(1) At the time of the accident the motor-car was not being used in connection with the business of the defendants' insured, Madam Tay, or with her permission.

(2) If contrary to the defendants' contention the said Quek Poh Khoon was driving with the permission of Madam Tay then the motor-car was used for a reliability trial, speed testing or for purposes in connection with the motor trade. The policy specifically stated that it did not cover use for a reliability trial, speed testing or use for any purpose in connection with the motor trade.

The trial judge found that "at the time of of the accident Quek Poh Khoon was using the car for and on behalf of the owner and therefore the car was not being used outside the limitations as to use in the policy" and gave judgment for the plaintiff with costs. The defendant company now appeals against that judgment.

The memorandum of appeal contains a number of grounds of appeal but counsel for the defendant company now abandons all the grounds save and except the last ground which reads as follows:—

> "The learned trial judge failed to make a finding on the evidence as to whether or not the said motor-car was at the time of the accident being driven for the purpose of testing for its efficiency or road worthiness and whether or not the circumstances amounted to a use for a purpose in connection with the motor trade so that such use and the risk arising therefrom were not covered by the policy of insurance."

Counsel for the defendant company concedes that at the time of the accident the car was being tested on the road after repairs had been carried out at the garage and the only point to be decided is whether at the material time the policy covered the use of the motor-car in the circumstances mentioned.

The relevant clause of the policy which prescribes limitations as to use reads as follows:—

> "Use only for social, domestic and pleasure purposes and for the policyholder's business. The policy does not cover use for hire or reward, racing, pace-making, reliability trial, speed-testing, the carriage of goods other than samples in connection with any trade or business or use for any purpose in connection with the motor trade."

Counsel for the defendant company relies on the last mentioned limitation, namely, "use for any purpose in connection with the motor trade" and submits that at the time of the accident the motor-car was being used by Quek in connection with the motor trade; that the testing of a motor-car after repairs is clearly a use in connection with the motor trade and that this user being outside the scope of the policy, the defendant company was not liable under the policy. He also submits that although at the time of the accident the motor-car may also have been used for the benefit of the owner, the fact remained that it was nevertheless being used for a purpose in connection with the motor trade; that accordingly there was a double user or overlapping of two different users and as the use in connection with the motor trade was expressly forbidden, the defendant company was not at risk at the time of the accident.

The point taken is of considerable importance, because every car, at some time or other, requires repairs, and invariably has to be tested on the road by the repairer to ensure that the

car has been efficiently repaired and is in good running order. The question to be decided is whether the testing of a car on the road by a motor-car repairer after repairs have been carried out, is a use for a purpose in connection with the motor trade.

There can be no doubt that a car can be in use for the policyholder's business, although the policyholder is neither driving it nor is in the car. This is clear from the decision of the Court of Appeal in *John T. Ellis Ltd.* v. *Hinds*,[1] where Lord Goddard C.J. said at page 339:—

> "No doubt, the owner of the car who drives himself uses the vehicle but so he does if it is driven on his account by his servant. A person who rides in his car while it is being driven by someone else, or who sends his driver out with his motor vehicle on business, uses, but does not drive the vehicle."

In a claim for damages against an insurance company, the question always is whether the policy covers the use that was being made of the motor-car at the time of the accident, and subject to any limitation in the policy, it is immaterial as to who was driving the car when the collision occurred. Therefore the substantial question to be decided on the facts of this case is, whether, at the time of the accident the car was in use for the policyholder's business or whether it was being used for a purpose in connection with the motor trade.

A similar point arose in *Official Administrator* v. *China Insurance Co., Ltd.*[2] In that case one Chellappah was killed when he was knocked down by a jeep belonging to one Wong Shin which was being road tested by one Lee Ngiow after he had repaired the jeep. The Official Administrator, as administrator of the estate of Chellappah, obtained judgment against Lee Ngiow for damages and subsequently claimed the amount of damages and costs from the defendant insurance company as the jeep was insured with them by the owner. It was argued at the trial that the defendant company was not liable because at the time of the accident the jeep was not being used for the business of the insured but for a purpose in connection with the motor trade of Lee Ngiow. It was held that at the time of the accident Lee Ngiow was using the jeep for and on behalf of the policyholder and therefore it was not being used outside the limitation as to use in the policy. Buhagiar J. explained the matter thus:—

> ". . . . It cannot be denied that the repairing of the jeep and the testing of it before returning it to the owner were part of the garage proprietor's business; the repairs to the jeep would be to the benefit of that business and it is only in that sense that it can be said that the jeep was being used "for any purpose in connection with the motor trade." But can it be said that the policyholder was using or allowed or permitted the use of the jeep for any such purpose? The answer in my opinion is clearly in the negative; the policyholder wanted the jeep for his business, he was going the next day to Penang on business, and naturally he wanted the jeep in good running order; after the repairs had been effected by the garage he wanted to be sure that it was in good running order and for this purpose he gave authority to the garage proprietor to test the jeep; and at the time of the accident the garage proprietor was using the jeep for and on behalf of the policyholder and therefore for the purposes of the policyholder. If the policyholder himself had carried out the test after the repairs had been completed, I do not think that there would be any doubt that the jeep was not being used in connection with the motor trade and I can see no difference between the policyholder carrying out the test himself and authorising or giving permission to somebody else to use the jeep for the purpose of testing it for him. If, while the garage proprietor had the custody of the jeep, he had used it for the purpose of an emergency call made to his garage to attend to a broken down car of one of his customers and an accident occurred while the jeep was being used for this purpose then that would clearly be use in connection with the motor trade, and as in the case of *Gray* v. *Blackmore*, [1934] 1 K.B. 95 the policy would not cover such use."

Counsel for the defendant company submits that Buhagiar J. came to a wrong decision in *Official Administrator* v. *China Insurance Co., Ltd.* and cites *Browning* v. *Phoenix Assurance Co., Ltd.*,[3] in support of his submission. In *Browning* v. *Phoenix Assurance Co., Ltd.*, the plaintiff who was a foreman employed by a garage was instructed by a car owner who wanted his car to be serviced, to drive the car for a longish run at his convenience, taking his family with him if he so wished, for the sole purpose of getting the transmission oil warmed up before it was drained. It was held on the proved facts, that the plaintiff was not driving the car for this purpose when he met with the accident and consequently was not driving it "on the insured's order or with his permission" and that the car was therefore not on risk under the policy at the time of the accident. We do not see how the decision in *Browning*'s case can be of any assistance to the defendant company. It is true that there is in that case the *obiter dictum* of Pilcher J. that if the plaintiff had in fact been requested and authorised by the car owner to take the car out in his own time with his family as passengers and to give it a general test for "squeaks, rattles and general running", the car would have been used by the plaintiff at the time of the accident for two purposes: (1) the permitted social purpose of taking his family for a prolonged drive and (2) a second purpose which would in the opinion of Pilcher J. have been a purpose in connection with the motor trade, which was a purpose excluded by the "Description of use" clause in the policy. It is unnecessary for us to decide whether the opinion expressed by Pilcher J. is correct because the facts in the present case are quite different. In the case before us, the car was being used for one purpose only, and that was to ascertain whether or not it was in good running order.

It seems to us to be obvious that every motor-car owner who sends his car to a garage for repairs wants to be sure that it is in good running order when he receives it back and for

this purpose he gives, either directly or by implication, authority to the garage proprietor to test the car after repairs, and when the car is being tested on the road, it is being used for and on behalf of the owner i.e. the policyholder and therefore for the purpose of the policyholder, the purpose being, as already stated, to make sure that it is in good running order. Such use, in our opinion, cannot be said to be a use "for a purpose in connection with the motor trade" in the proper sense of the expression. Buhagiar J. has in *Official Administrator* v. *China Insurance Co., Ltd.* given a good example of a use for a purpose in connection with the motor trade and another example is to be found in *Gray* v. *Blackmore.*[4]

For all these reasons we are of the opinion that at the time of the accident, the car was not being used outside the limitations as to use in Policy No. NT/MC. 696379 issued to Madam Tay by the defendant company, and the appeal is therefore dismissed with costs.

Appeal dismissed.

Solicitors: *S.K. Lee & Co.; Murphy & Dunbar.*

PUBLIC PROSECUTOR v. SUBRAMANIAM

[A.Cr.J. (Abdul Aziz J.) November 25, 1968]
[K.L. — Criminal Appeal No. 44 of 1968]

Penal Code, s. 325 — Voluntarily causing grievous hurt — Evidence — Medical report — X-ray film — Radiographer not called — Criminal Procedure Code (Cap. 6), s. 399.

The respondent was charged under section 325 of the Penal Code. At the close of the prosecution case the president discharged and acquitted him on the ground that as the radiographer was not called there was no evidence that the fracture shown on the X-ray film was that of the complainant. In passing the president remarked that the case was poorly investigated and no statements were taken from independent witnesses. Since these independent witnesses were not called to give evidence, it was right he should also invoke section 114(g) of the Evidence Ordinance, 1950.

Held: as the medical report was properly admitted as evidence and the report clearly showed the injuries sustained, that was sufficient to warrant a conviction. The fact that the contents of the report have not been proved to the hilt matters little.

Per Abdul Aziz J.: "As regards the observation of the learned president, I feel that such an observation that the case was not properly investigated is uncalled for and is strictly outside the duty of the learned president. Not having seen the investigation papers, it is hardly right for the learned president to make such comments. His concern is merely to decide whether or not a *prima facie* case has been made out to justify calling upon the defence. Whether or not to call the so-called independent witnesses is according to the long line of cases a discretion for the prosecution. These cases show that it is not incumbent on the prosecution to call every witness present at the scene."

[Editorial Note: Reference may be made to *Harjit Singh* v. *R.* [1963] M.L.J. 287.]

MAGISTRATE'S CRIMINAL APPEAL.

Hashim bin Majid (Deputy Public Prosecutor) for the appellant.

M. Segaram for the respondent.

Abdul Aziz J. (delivering oral judgment): This is an appeal by the learned deputy public prosecutor against the order of acquittal and discharge made by the learned president, sessions court, Klang, on the 8th day of November, 1967. The respondent was charged in the sessions court as follows:—

"That you on 27.6.67 at about 6.45 p.m. at Kampong Bukit Jeti, Kampong Jawa Road, Klang, in the State of Selangor, voluntarily caused grievous hurt to Loganathan s/o Packirisamy and that you have thereby committed an offence punishable under section 325 of the Penal Code."

The complainant's wife, his eldest and younger sons gave evidence that the accused hit the complainant with a stick. The medical report shows that the complainant suffered a fracture of the skull. At the close of the prosecution, the learned president discharged the accused on the sole ground that since the radiographer was not called there was no evidence that the fracture shown on the X-ray film was that of the complainant. Consequently he held that there was no *prima facie* case of grievous hurt. In passing he remarked that the case was poorly investigated. No statements were taken from independent witnesses. Since these independent witnesses were not called to give evidence, it was right he should also invoke section 114(g) of the Evidence Ordinance.

In my view the learned president erred in discharging the respondent on the ground that the radiographer was not called. He seemed to have lost sight of the fact that the medical report was properly admitted as evidence under section 399 of the Criminal Procedure Code and that report clearly showed that the complainant suffered a fracture of the skull. The fact that the contents of the report have not been proved to the hilt matters little. In any event under section 399 it is a duty of the respondent to give notice if it requires such strict proof.

As regards the observation of the learned president, I feel that such an observation that the case was not properly investigated is uncalled for and is strictly outside the duty of the learned president. Not having seen the investigation papers, it is hardly right for the learned president to make such comments. His concern is merely to decide whether or not a *prima facie* case has been made out to justify calling upon the defence. Whether or not to call the so-called independent witnesses is according to the long line of cases a discretion for the prosecution. These cases show that it is not incumbent on the prosecution to call every witness present at the scene.